IN THE

Supreme Court of the United States

October Term, 1976

No. [redacted] 77

AUTOMATIC FIRE ALARM COMPANY OF DELAWARE,

Appellant,

v.

THE UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States for the District of Rhode Island

JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANT AUTOMATIC FIRE ALARM COMPANY OF DELAWARE

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED:	
(A) As to Restraint of Trade and Monopoly	3
(B) As to Relief Granted	5
(C) As to the Trial Itself	5
STATUTES INVOLVED	6
STATEMENT OF THE CASE	8
(1) Introduction	8
(2) Monopoly	17
(3) Relevant Market	21
(4) Interstate Commerce	25
(5) Imputabilty of Acts of Co-defendants	28
(6) Effect of 1906 and 1907 Agreements	31
(7) Propriety of Relief Granted	33
(8) Questions as to Trial Itself	40
SUMMARY AND CONCLUSION	42
APPENDIX	1a

TABLE OF AUTHORITIES

Statutes:

PAGE

Expediting Act of 1903 §2, 32 Stat. 823, 15 U. S. C. §29 2

Sherman Act, 26 Stat. 209, 15 U. S. C. §§1, 2, 4 ..... 2, 3, 4, 6, 7, 8

Decisions:

American Tobacco Co. v. United States, 328 U. S. 781 19

Automatic Fire Alarm Co. of Delaware v. Bowers, 51 F. 2d 118 16

Automatic Fire Alarm Co. of New York v. Bowles, 143 F. 2d 602 ..... 14, 37

Automatic Fire Alarm Co. (N. Y. and Del.) v. Commissioner of Internal Revenue, 13 B. T. A. 1195 16

Brown Shoe Co. v. United States, 370 U. S. 294 ..... 3, 42

Continental Can Company v. United States, 378 U. S. 441 3

Hartford-Empire Company v. United States, 323 U. S. 386 36

Hartford-Empire Company v. United States, 324 U. S. 570 42

Peto v. Howell, 101 F. 2d 333 20

Schine Theatres v. United States, 334 U. S. 110 ..... 19, 35

Times-Picayune Publishing Co. v. United States, 345 U. S. 594 ..... 3, 18, 21

United States v. Aluminum Company of America, 148 F. 2d 416 18

United States v. Columbia Steel Co., 334 U. S. 499 21

PAGE

United States v. E. I. duPont de Nemours & Co., 351 U. S. 377 ..... 3, 21
United States v. E. I. duPont de Nemours & Co., 366 U. S. 316 ..... 39, 42
United States v. Employing Plasterers Association, 347 U. S. 186 3
United States v. Griffith, 334 U. S. 100 ..... 19, 21
United States v. Grinnell Co., 236 F. Supp. 244 1
United States v. International Harvester Co., 274 U. S. 693 18
United States v. Paramount Pictures, 334 U. S. 131 19
United States v. Socony-Vacuum Oil Co., 310 U. S. 150 17
United States v. Swift & Company, 286 U. S. 106 18
United States v. Trenton Potteries, 273 U. S. 392 17
United States v. United Shoe Machinery Corp., 110 F. Supp. 295, aff'd 347 U. S. 521 ..... 3, 19, 24
United States v. United States Steel Corp., 251 U. S. 417 18

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Opinion Below

The opinion of the District Court (Wyzanski, D. J.) is officially reported at 236 F. Supp. 244 (1964), and is also unofficially reported in 1964 Trade Cases ¶71,298.

The opinion which includes findings of fact, conclusions of law, opinion on liability, and opinion on remedy, is set forth in the Appendix to this statement (App. pp. 1-34a).

Jurisdiction

This action was brought in the United States District Court for the District of Rhode Island by the United States as complainant under the provisions of Section 4 of the Sherman Act (Act of July 2, 1890, c. 647, 26 Stat. 209, as amended, 15 U. S. C. §4) to prevent and restrain alleged violations of Sections 1 and 2 of that Act.

The final decree was made and entered on November 27, 1964. A copy of the decree is set forth in the Appendix (pp. 35a-37a).

On January 25, 1965 the United States filed a notice of appeal to the Supreme Court. Shortly thereafter on the same day the appellant Automatic Fire Alarm Company of Delaware (hereinafter designated "AFA"), and the appellant Grinnell Corporation (hereinafter designated "Grinnell"), and the appellant American District Telegraph Company (hereinafter designated "ADT"), and the appellant Holmes Protective Electric Company (hereafter called "Holmes") filed in the Office of the Clerk of the District Court separate notices of appeal to the Supreme Court.

Jurisdiction of the appeal is conferred on the Supreme Court by Section 2 of the Expediting Act of February 11, 1903 as amended, 32 Stat. 823, 15 U. S. Code §29, which is as follows:

"§29. Appeals to Supreme Court

In every civil action brought in any district court of the United States under any of said Acts, wherein

the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

Cases supporting jurisdiction are: *Continental Can Company* v. *United States,* 378 U. S. 441 (1964); *Brown Shoe Co.* v. *United States,* 370 U. S. 294 (1962); *United States* v. *E. I. duPont de Nemours & Co.,* 351 U. S. 377 (1956); *United States* v. *Employing Plasterers Association,* 347 U. S. 186 (1954); *United Shoe Machinery Corp.* v. *United States,* 347 U. S. 521 (1954); and *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594 (1953).

Questions Presented

A. As to Restraint of Trade and Monopoly

1. Whether the District Court properly held that the burden of proof shifts to a defendant charged with monopolization in violation of Section 2 of the Sherman Act, as soon as the Government shows the relevant market and how predominant a share of that market the defendant has.

2. Whether in the present case the relevant market was properly confined to insurance accredited Central Station Protective Service (hereinafter designated "CSPS") supplied throughout the United States.

3. Whether any of the activities of the only AFA operating subsidiary were in interstate commerce, or had any substantial effect on interstate commerce.

4. Whether AFA was properly treated as an integral part of a group consisting of AFA, ADT and Holmes with

all controlled by Grinnell, and thereby held liable for having restrained and monopolized interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Act. (A subsidiary question is whether the ultimate relationship of AFA [not organized or incorporated until 1920 and not affiliated with Grinnell through stock control before 1949] and its co-defendants ADT and Holmes which became similarly affiliated with Grinnell in 1950 and 1952 respectively was properly accepted as a basis for holding AFA jointly so liable.)

5. Whether an agreement made between ADT and Holmes in 1906, at a time when ADT, Holmes and AFA were not affiliated, and which was terminated by the parties thereto in 1947 was illegal and influenced the formation of subsequent business patterns of AFA after 1954 thereby justifying a finding of restraint of trade and monopolization by AFA.

6. Whether an agreement* made in 1907 between ADT, AFA, Grinnell and Automatic Fire Protection Company, not a defendant, at a time when none of the parties were affiliated and which contract expired in 1954 was illegal and influenced the business patterns of AFA long after expiration, and thus supported a finding of restraint of trade and monopolization by AFA.

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* This agreement was submitted to the Antitrust Division of the Department of Justice in 1953 when Grinnell obtained a "clearance" in connection with its purchase of a controlling interest in ADT.

B. As to Relief Granted

7. Whether the prohibition of future acquisitions by AFA in the designated market is a proper form of relief under the circumstances of the case.

8. Whether the decree appealed from prohibits indiscriminately every activity which might ever be held to be a violation of the Sherman Act in the designated market, and is so unclear and imprecise as to provide no reasonable opportunity to determine what might be a violation of the decree. (A subsidiary question is whether the decree properly requires the filing of price lists and deviations with the Antitrust Division of the Department of Justice.)

9. Whether the prohibition of any employment of James Douglas Fleming, now a director of AFA, as an officer, director, agent, or otherwise after April 1, 1966 deprives AFA of liberty and freedom of action without due process of law in violation of the Fifth Amendment of the United States Constitution.

C. As to the Trial Itself

10. Whether AFA was deprived of due process of law and a fair trial by being forced into trial on 18 days' notice, without prior warning, without adequate pre-trial procedures and without a reasonably sufficient time for final trial preparation.

11. Whether AFA was deprived of due process of law and a fair trial when the District Court failed to disqualify itself in spite of having formed a conclusion on the merits prior to the commencement of trial.

12. Whether the District Court erred in receiving as against AFA, evidence offered *en masse* by the Government including hearsay evidence and statements of the alleged co-conspirators without any foundation having been laid by independent evidence of the alleged conspiracy and of any connection of AFA therewith.

Statutes Involved

1. Sherman Act, §1 (Act of July 2, 1890, c. 647, 26 Stat. 209 as amended, Title 15, U. S. Code, §1) as here relevant provides:

> "§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal:
>
> • • •
>
> Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

2. Sherman Act, §2 (*op. cit. supra,* §2):

> "§2. Monopolizing trade a misdemeanor; penalty
>
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other

person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

3. Sherman Act, §4 (*op. cit. supra,* §4):

"§4. Jurisdiction of courts; duty of United States attorneys; procedure

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

Statement of the Case

1. Introduction

In the complaint the Government charged an over-all conspiracy to restrain and monopolize, and an attempt to monopolize, and monopolization of interstate commerce in central station protection service against fire, burglary and other hazards throughout the United States in violation of Sections 1 and 2 of the Sherman Act (15 U. S. Code, §§1 and 2).

The Government alleged that Grinnell, a manufacturer of automatic sprinkler systems and protection devices,* owns 75% of the stock of ADT which engages nationally in the CSPS business as well as the manufacture of protection devices; that Grinnell wholly owns Holmes, which engages in the same business in the cities of New York, Philadelphia and Pittsburgh; and that Grinnell owns approximately 88% of the stock of AFA, which engages in the same business directly or through subsidiaries in the cities of New York, Philadelphia and Boston.

The Government further alleged that subscribers for accredited CSPS receive substantial discounts on hazard insurance premiums; that an installation charge is usually paid by the subscriber but title to the equipment installed is retained by the CSPS; that the subscriber is then charged an annual service charge; that CSPS companies usually obtain contracts for periods of several years, and that if the contract is not renewed, the protection devices are removed from the subscriber's premises.

* Grinnell ceased manufacturing protection devices in 1960.

The Government further alleged that in 1959 there were 33 central station companies in the United States with 94,000 subscribers in 119 cities, and that the income from such service in 1958 was over $60,000,000.

Speaking of ADT, the Government alleged that it is the largest central station company and the only one operating throughout the United States having 119 stations in 114 cities in 35 states and the District of Columbia; that in 1958 it had 60,142 subscribers (64% of the national total), and that it received $42,890,911 in annual service charges (72% of the national total); and that in 88 cities it had no competition from other central station companies.

Speaking of Holmes, the Government alleged that it is the second largest central station company in the United States, with 11 stations at New York City, 2 at Philadelphia and 1 in Pittsburgh having 14,218 subscribers in 1958 (15% of the national total); and that it received $7,521,411 in annual service charges (12% of the national total).

Speaking of AFA, the Government alleged that it is the third largest central station company in the United States, operating stations at New York, Boston and Philadelphia with 5,167 subscribers in 1958 (5% of the national total), and that it received $3,324,662 in annual service charges (5% of the national total).

Speaking of Grinnell, the Government alleged that through stock ownership in the other defendants it controlled in 1959 136 central stations out of about 170 in the United States; and in 1959 that it controlled companies having 79,500 subscribers (85% of the national total)

and receiving annual service charges of $53,730,000 (90% of the national total).

The Government further alleged that since 1906 the defendants or their predecessors entered into agreements defining areas in the United States in which they would provide central station service; limiting the types of such service which they would supply in certain areas; and providing for joint participation in the installation of certain systems and for dividing the revenue among themselves.

The Government sought injunctive relief to prevent the carrying out of the alleged combination and conspiracy, and attempts to monopolize, and monopolization. In particular, the Government requested that Grinnell be required to dispose of all its capital stock interest in ADT; that ADT be required to divest itself of so much of its assets as may be necessary to assure competition on the local level; that ADT be required to divest itself of all manufacturing facilities for protection devices; that the subscribers be given title to equipment installed on their premises when ADT, Holmes or AFA have recovered their costs and overhead; that ADT, Holmes and AFA be required to contract in the future on a one year basis or permit their subscribers to cancel without penalty after one year or at any subsequent anniversary; and that the defendants terminate all agreements between them and refrain from continuing to observe any of their provisions.

In its answer AFA denied the basic charge but admitted that it has a subsidiary corporation providing CSPS at New York, Philadelphia and Boston; that Grinnell owns approximately 88% of the stock in AFA; that AFA's serv-

ice contracts are usually for a period of five years and that on termination AFA normally removes the protection devices previously installed on the subscriber's premises; and that in 1958 its subsidiary providing CSPS had 5,167 subscribers paying $3,324,663 in service charges annually.

AFA also admitted that its subsidiary supplied certain protection devices used in connection with service by subsidiaries of ADT in the cities of New York, Philadelphia, and Boston, and that AFA receives a percentage of the revenues.

By way of an affirmative defense, AFA alleged that prior to 1906 and thereafter its service and equipment and all problems relating thereto were local and intrastate in character. As a further affirmative defense, AFA alleged that all agreements between the parties other than those made after 1952 had expired long before the action, and that all issues relating to them were moot.

District Judge Charles E. Wyzanski, Jr., of the District of Massachusetts, was assigned to hear the case after District Judge Edward W. Day of the District of Rhode Island and Chief Judge George C. Sweeney of the District of Massachusetts both found themselves disqualified.

There were lengthy pre-trial proceedings including 110 depositions containing 11,162 pages, and numerous interrogatories.

On May 28, 1964 Judge Wyzanski set the case down for trial for June 15, 1964 (18 days off). On June 3, 1964 he denied a defendants' motion for delay of trial, and over-

ruled all objections to proceeding to trial at the time set. The application for delay had been based on the grounds that there had not been adequate pre-trial proceedings to narrow the issues to be tried, and that reasonably sufficient time was not allowed to the defendants for completion of final preparation for trial. (See Transcript of June 3, 1964, pp. 1-14.)

On June 9, 1964, the defendant alarm companies filed a motion for an order disqualifying Judge Wyzanski on the ground of personal bias and prejudice. The supporting affidavit referred to comments made by Judge Wyzanski at the pre-trial hearing held on May 28, 1964 and asserted the belief based on such comments that he had formed an opinion and view of the merits of the case, and had thus prejudged the case.

Judge Wyzanski referred that motion to Chief Judge Woodbury who denied the motion on June 11, 1964.

Trial commenced on June 15, 1964 and was concluded on June 24, 1964 after a total of six trial days. During the trial the Government called no live witnesses. It offered numerous documentary exhibits and excerpts from 38 depositions amounting to 2698 pages. After the defendants introduced excerpts of 47 depositions, the Government offered the 47 depositions containing 3774 pages in their entirety. The defendants called a number of witnesses and offered numerous documentary exhibits.

On October 9, 1964, after receiving post-trial briefs, Judge Wyzanski heard arguments. His opinion was then filed on November 27, 1964.

The statement which follows is confined to the particular position of AFA.

The Government presentation and the opinion of the District Court treat of all the defendants collectively as a fully integrated combination conspiring in violation of the antitrust laws. A basic contention of AFA on this appeal is that it was constantly and improperly labelled a part of the so-called "Grinnell-controlled combination", and that no attention was given to the distinguishing features of its position, the history of how and when it became involved, or the actual facts of how it operated. In this fashion it was charged indiscriminately with every act attributed to any of its co-defendants regardless of its non-involvement and the time or extent of direct or indirect affiliation. Although the affiliation with Grinnell did not occur until 1949, AFA was held jointly for every act on the part of Grinnell, ADT or Holmes before or after 1949.

Actually affiliation first began in 1949 when Grinnell acquired a majority stock interest in AFA which devotes itself solely to CSPS against fire hazards in New York, Philadelphia and Boston although it also provides Supervisory Service for Waterflow in those cities under an arrangement with ADT. In 1950 Grinnell bought all of Holmes' stock from New York Telephone Company. In 1952 Grinnell acquired a stock interest in ADT. In 1953 it bought the interest of Western Union thereby obtaining control of ADT.

The District Court nevertheless found the combination and conspiracy to have had its inception in the 1906 and

the 1907 agreements (Conclusions of Law, par. 2, App., p. 26a).

The nature of the central station fire alarm business as done by the operating subsidiary of AFA is a matter of judicial record in several cases.

In *Automatic Fire Alarm Co.** v. *Bowles,* 143 F. 2d 602 (U. S. Emergency Court of Appeals 1944), Chief Judge Maris summarized the business then as follows (p. 603):

> "The complainants solicit and obtain contracts for automatic central office fire alarm service, central office sprinkler valve alarm service, central office sprinkler supervisory service, manual central office fire alarm service, and combination manual central office and interior fire alarm service. Pursuant to such a contract a complainant installs in its customer's premises the equipment required for the detection of fire, or of waterflow in the customer's sprinkler system, as the case may be, for the electrical transmission to the central office of appropriate signals and in some instances the ringing of bells in the protected premises, and also for the transmission to the central office of supervisory or trouble signals indicating that the complainant's equipment or the customer's sprinkler system is not in normal operating condition. The use, control, and, with very infrequent exceptions, the ownership of the devices thus installed in the customer's premises are retained by the complainant. The devices are connected by telephone wires, leased from the local telephone company, with the central office at which the various signals are received.
>
> At a complainant's central office fire signals received from a customer's premises are relayed to the

* This plaintiff is AFA's operating subsidiary.

local fire department as are waterflow signals when received outside of business hours. When waterflow signals are received during business hours the customer is communicated with by telephone and the cause ascertained. Upon receipt of any signal, whether fire, waterflow, tank alarm, supervisory or trouble, a complainant's practice is for one of its employees from the central office to respond immediately by visiting the customer's premises from which the signal was received, investigating and ascertaining the cause and if possible restoring the equipment to normal operation. An employee at the central office also communicates by telephone with the person in charge of the protected building.

These protective systems are installed, operated, maintained and kept in repair by the complainants. They are periodically inspected by the complainants' employees to the end that they may be kept in proper operating condition. The complainants also solicit and enter into sprinkler valve alarm and sprinkler supervisory service contracts for operation by the American District Telegraph Company, which company installs the necessary equipment, the complainants paying for the transmitters and manual fire alarm boxes installed and receiving a percentage of the revenue. The complainants do not, however, participate in any way in the installation, maintenance, or operation of equipment thus installed by the American District Telegraph Company nor do they render any service with respect thereto.

Only in unusual instances are the systems which we have described sold. On the contrary the almost universal practice is for title thereto and control thereof to be retained by the complainants or the American District Telegraph Company, as the case may be, the contracts providing that the equipment

'shall be and remain personal property owned solely by' them and that they are authorized to maintain, inspect, test and repair it. The contracts are normally for five year periods and provide for automatic renewal from year to year unless a specified notice of termination is given by either party. They provide for a charge, usually payable annually in advance, for the maintenance and operation of the system. It is established by the record and admitted by the Administrator in his answer that no charge is made by the complainants for repairs or replacements and that only in rare and exceptional cases do complainants make any charge for installation."

In *Automatic Fire Alarm Co. of New York and Automatic Fire Alarm Co. of Delaware* v. *Commissioner of Internal Revenue,* 13 B. T. A. 1195 (1928), the Board of Tax Appeals considered the history of these companies and found that AFA, the appellant here, was organized in 1920 as a holding company to take over stock in the New York Company and investments held by it in other companies.

Similarly in *Automatic Fire Alarm Co. of Delaware* v. *Bowers,* 51 Fed. 2d 118 (D. C. N. Y. 1931), District Judge Caffey found the Delaware company (the appellant here) not to be subject to special excise tax. In so doing, he found, on analysis, that this holding company was not actually doing any business.

The history thus shown emphasizes the question how AFA can be charged with actions of others taken years before it was organized, and the further question how AFA could be considered to be in, or affecting interstate commerce no matter what view was taken of its operating subsidiary's operations.

2. As to Monopoly

In this case the District Court has gone beyond all precedent by eliminating any necessity of proving specific intent in a monopoly case. The Court found as a matter of law that as soon as the Government shows what is the relevant market and how predominant a share of that market the defendant has, the burden shifts to the defendant to go forward and establish that its "eminence" is traceable to such highly respectable causes as superiority in means and methods which are "honestly industrial" (App., p. 7a).

The Court said (App., p. 7a):

> "The Government need not prove, and in a well-conducted trial ought not to be allowed to consume time in needlessly proving, defendant's predatory tactics, if any, or defendant's pricing, or production, or selling, or leasing, or marketing, or financial policies while in this predominant role."

In effect, the District Court enunciated a new *per se* violation doctrine applicable to monopoly cases under Section 2, differing from the now well established *per se* doctrine relating to certain Section 1 cases, only in that instead of an irrebuttable presumption of illegality, the District Court held that the defendants had the opportunity to undertake the burden of rebutting the presumption of guilt by proving their innocence.

Cf. United States v. *Trenton Potteries,* 273 U. S. 392, 397 (1927);
United States v. *Socony-Vacuum Oil Co.,* 310 U. S. 150 (1940).

This new doctrine was declared in the post-trial, post-argument opinion without the appellant AFA having had any informed opportunity to deal with it. It is noteworthy that this new doctrine was not suggested by Government trial counsel who spent great effort in trying to prove specific intent only to be admonished in the post-trial opinion that most of his work was unnecessary, if not wasteful (App., p. 7a).

The Supreme Court has recognized that the completed offense of monopolization requires only general intent to do the acts resulting in the monopolization, but that a specific intent to destroy competition or to build monopoly is essential to establish offense of an attempt to monopolize. *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594 (1953).

As to the monopolization itself, it was originally held that mere size alone or the existence of unexercised monopoly power did not constitute the crime of monopoly in violation of Section 2 in the absence of specific acts amounting to unlawful conduct. *United States* v. *United States Steel Corp.,* 251 U. S. 417, 451 (1920); *United States* v. *International Harvester Co.,* 274 U. S. 693, 708 (1927). It seems to have been first suggested in *United States* v. *Swift & Company,* 286 U. S. 106, 116 (1932), that size alone *might* constitute the offense.

Later the famous decision written by Judge Learned Hand in *United States* v. *Aluminum Company of America,* 148 F. 2d 416, 427 (2nd Cir. 1945), started the notion that monopolization can rarely be unintentional and, therefore, size alone *might* constitute the offense.

At best the *Alcoa* case again suggests that intention to maintain the hold obtained on the market may be the equivalent of a specific intent to monopolize, and therefore proof of intentional control of the market can show *prima facie* a violation of Section 2.

In *American Tobacco Co.* v. *United States,* 328 U. S. 781 (1946), which followed soon after *Alcoa,* the opinion by Mr. Justice Burton endorsed certain portions of the *Alcoa* opinion, but nowhere approached the holding of the presumption now suggested to arise from mere proof of market control.

In *United States* v. *Griffith,* 334 U. S. 100 (1948), the Court spoke of monopoly power as constituting a violation even though unexercised, citing *Alcoa* and then went on to state (p. 107):

> "Hence the existence of power 'to exclude competition when it is desired to do so' is itself a violation of §2, *provided it is coupled with the purpose or intent to exercise that power.*" (Emphasis supplied.)

Similar statements were made in *Schine Theatres* v. *United States,* 334 U. S. 110 (1948), and *United States* v. *Paramount Pictures,* 334 U. S. 131 (1948).

By 1953, Judge Wyzanski, writing in *United States* v. *United Shoe Machinery Corp.,* 110 F. Supp. 295 (D. C. Mass. 1953), *aff'd without opinion* in 347 U. S. 521 (1954), held that market control constitutes a violation of Section 2 unless economically inevitable.

In the decision now appealed from, Judge Wyzanski, relying upon *Alcoa* and the development of the law which

he had summarized in *United Shoe Machinery Corp.*, and recognizing that the trend has been less clear with regard to Section 2, said (App., p. 6a):

> "* * * most of the cognoscenti have expected that a day would come when the Supreme Court would announce that where one or more persons acting jointly had acquired so clear a dominance in a market as to have the power to exclude competition therefrom, there was a rebuttable presumption that such power had been criminally acquired and was a monopolizing punishable under §2."

Then, Judge Wyzanski announced the new doctrine as follows (*id.*, p. 7a):

> "To this Court it appears that the day has come for it, and more important for counsel, to proceed on the acknowledged principle that once the Government has borne the burden of proving what is the relevant market and how predominant a share of that market defendant has, it follows that there are rebuttable presumptions that defendant has monopoly power and has monopolized in violation of §2."

Presumably the Court was speaking for the enlightenment of counsel in future cases because the doctrine was not unfolded for the benefit of trial counsel for the parties here before the close of the case below.

There are, of course, obvious cases such as a conspiracy or attempt to obtain a corner in the market of a commodity. A large hold on raw materials and manufacturing facilities in a particular product is something the holder must be aware of as he acquires it. *Cf. Peto* v. *Howell*, 101 F. 2d 353 (7th Cir. 1938).

A position in a market for services, however, is quite a different thing. A company providing services must try to succeed by being there first and with the most, or the most and the best for the least. Unlike the market for commodity, the market for services involves intangibles. Any determination that a particular individual or corporation rendering services monopolized in violation of Section 2 of the Sherman Act must involve careful consideration of many factors, and not just relevant market and share of market alone.

Unless the Supreme Court adopts the new *per se* doctrine invoked below, it should still be necessary to prove the body of the crime, by something more than mere size alone. Unless evidence encompassing all of the essential elements has to be presented, and the case fully made out at least *prima facie*, a monopoly case will hereafter become a pure matter of statistics. The basic element of criminal intent, and human guilt or innocence will be gone. So too must be any notion that a defendant should be presumed to be innocent until proved guilty.

The questions presented by the new doctrine adopted below are important, and should be reviewed by the Supreme Court.

3. As to the Relevant Market

The necessity of ascertaining the relevant market at the threshold of a monopoly case is well settled. *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 510, 519 (1948); *United States* v. *Griffith*, 334 U. S. 100 (1948); *United States* v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377 (1956); *Times-Picayune* v. *United States*, 345 U. S. 594, 612 (1953).

In the present case the District Court adopted as the designated market an artificially restricted area of a much larger market. In so doing the District Court threw AFA into a national market in which it is not engaged, and one encompassing services which it does not provide.

In effect, the District court treated AFA as an integral part of a conspiring monopoly-combination controlled by Grinnell. In so doing, it held AFA as a monopolist by reason of an alleged history of policies and acts on the part of others going back to many years before there was ever any indirect affiliation between ADT and AFA because of Grinnell's stock acquisitions between 1949 and 1953.

The District Court also ignored the fact that in the three cities where AFA's operating subsidiary operates independently, there has been and continues to be, active competition. The District Court itself in Finding 9 (App., p. 10a), found that in all of the three cities AFA had CSPS competition.

The District Court also found generally in Finding 45 (App., p. 20a) that AFA's share of subscribers and revenue along with the other defendant alarm companies in the period from 1957 to 1961 showed a "slightly declining trend". In the same Finding, the District Court found that there was no persuasive evidence that any prospective entrant into the field had been unable to begin operations or had failed or had been driven out of business, and further that: "The most that can be said is that some competitors complain of what they regard as unsatisfactory profits."

Such findings negative the evidence of power to control prices, and to exclude competition which one expects to hear in the condemnation of a criminal monopolist.

The District Court's designation of the relevant market with regard to AFA was clearly erroneous both as to the scope of the market and as to the particular area in which it operates. There was no evidence that AFA's operating subsidiary had any "national accounts" or did any interstate business. As to it, the market designated was wholly irrelevant.

AFA contended unsuccessfully that its business is only a part of the total industry of protective service in the separated local areas which its operating subsidiary serves, and that the business of furnishing and servicing local, proprietary and electric alarm systems should have been included in the designated market.

The evidence showed that there is effective competition between AFA and non-central station and unapproved central station services and systems and that in AFA's three operating areas, the suppliers of these other services have revenues approximately twice that of AFA.

The interchangeability of AFA's service and that of its competitors, and the competition between them are shown not only by substitution of one system for the other, but also by the fact that similarly situated customers have different systems, that AFA and all its competitors solicit the same new prospects, that the other systems have an impact on the price of CSPS and, in general, that the various systems and services fulfill the same function.

For example, users of the various kinds of service include all types of commercial and industrial enterprises. Similar institutions sometimes use a central station in one place while using a local burglar alarm in another. It was also shown that in the same type of stores, some use central station while others use guards even when CSPS is available (see: Guibert Deposition, p. 113).

On the Burglar Alarms deposition, it was shown that there is an "overlap" of local and central station service so that one customer might be sold by either one (pp. 106, 119).

It appeared by deposition of an AFA competitor, Central Station Signals, Inc., that in New York a combination of both services has been used by Macy's, United Parcel and American Tobacco Co. (GX. 339, pp. 48-49).

The problem of ascertaining the relevant market has been said to turn on "discovering patterns of trade which are followed in practice". *United States* v. *United Shoe Machinery Co.*, 110 F. Supp. 295, 303 (D. Mass., 1953, Wyzanski, D. J.) aff'd without opinion, 347 U. S. 521.

It is undisputed that proprietary, auxiliary, direct connected, unapproved central station service, telephone answering and local alarm service as well as watchmen all serve the same purposes for affording protection from fire, burglary or other hazards, and minimizing losses from those same risks as well as malfunction of machinery, negligence of personnel, and other hazards (*Cf.* complaint, pars. 8, 9).

In drawing a circle containing within it the designated market of CSPS approved by insurance underwriters, the District Court proceeded entirely on the basis that AFA's system was in the prestige class so that the comparison was as between a six cylinder car and a chauffeur driven sedan (Finding 13, App., p. 11a). The Court, however, completely ignored the fact that insurance companies do give discounts where there is watchmen service, varying according to the number of watchmen (GX 346 [pp. 36, 40-48, 62-63], GX 5 [p. 335], Ex. D 75e [pp. 121, 212, 214-15, 333-35, 417-18, 515, 628-29], W. 33 [p. 5], A-389, B-11, B-12, B-19, B-21, B-30, B-92, E-55, GX 337 [pp. 1, 6-7]). True, the discount may not be as high as that accorded to AFA customers, but this indicates that the customer had a selection of price range leading to differences in insurance premium discounts.

The fact that there is such a difference only emphasizes the effectiveness of competition. When a customer chooses a service with a lower rate and a lower discount, the business is just as effectively lost by AFA as if it were going to another accredited CSPS company.

The question of the propriety of the method of designating relative market used by the District Court is most important, and should be reviewed by the Supreme Court.

4. The Interstate Commerce Question

Concededly AFA was a Delaware holding company having a separate operating subsidiary engaged in separate local operations in New York, Philadelphia and Boston. In no instance did the service cross state lines. In Finding

No. 3 (App., p. 8a) the District Court recognized that a central service station is physically independent of any other central service station, and that it must operate within a 25-mile radius.

The fact that AFA is merely a holding company and that its operating subsidiary does not serve across state lines was ignored because of Finding 4 that the ultimate supervision of the defendants is nationally directed, and that the enterprise in appearance and reality, financing, selling, advertising, purchasing of equipment, processes of management, and over-all planning, is national (App., p. 9a). In this finding, the Court again blanketed AFA in a "Grinnell-controlled combination" and completely ignored the fact that AFA's operations were not national, that AFA gave no appearance of being national and that AFA's advertising and selling were necessarily local.

AFA might just as well have had three wholly unrelated businesses in the three cities. It could have had a shoe store in Boston, a restaurant in New York and a barbershop in Philadelphia. The shoes sold, the food dispensed and the razors used could have all come from other states without any of these enterprises being considered in interstate commerce or having any substantial effect upon it.

The Government's contention that interstate commerce was present in the case depends entirely upon treating AFA as an integral part of an over-all operation participated in by Grinnell, ADT and Holmes.

As to the trade and commerce involved, the Government took the following positions:

1. That the defendants were engaged in a multi-state business through subsidiaries, district sales offices and other subdivisions located in various states, all of which was carried on under the supervision and control of Grinnell (Government Post-Trial Brief, p. 5).

2. In referring to facts claimed to cause the defendants in general, and AFA in particular, to be considered to be in or as affecting interstate commerce, the Government pressed upon the need for CSPS in many places, the need for regular flow of equipment across state lines, interstate communications and interstate credit and exchange (Government Post-Trial Brief, p. 6).

Actually there was no evidence on these subjects relating to AFA.

AFA contends that it was not engaged in interstate commerce, and, therefore, the alleged violations of the Sherman Act must fail for lack of jurisdiction. This contention was raised from the beginning, by AFA's answer to the complaint. Its first affirmative defense asserts that its service and all agreements between the defendants with respect thereto were and are local and intrastate in character.

A decisive vice in the decision below is that the Court treated AFA as an integral part of a larger national operation simply because some of its stock had been acquired by Grinnell which also happened at different times to acquire stock of ADT and of Holmes. Thus, to the child was imputed first the acts and implied intentions of its adoptive parent, and then those of its two independently

adopted stepbrothers. By similar imputation, AFA was thrust into interstate commerce. This is an extreme application of the discredited theory of guilt by association.

This untenable theory and curious result were unsupported in fact, and present an important question which can affect many other corporations having capital stock affiliations. It should be reviewed by the Supreme Court.

5. The Imputability of Acts of Co-defendants

A basic problem underlying all of the questions already discussed is whether there was sufficient evidence to support the finding that AFA violated Section 1 of the Act and whether there was any evidence to support the finding that AFA itself violated Section 2 of the Act even within the relevant market designated by the Court.

The District Court has found as "ultimate facts" that:

(a) The business of insurance accredited CSPS is a trade or an industry constituting part of the commerce among the several states subject to regulation under the Commerce Clause of the Constitution, and regulated by Congress under the Sherman Act (Finding 43).

(b) Such business is conducted by AFA, and is controlled by Grinnell (Finding 43).

(c) One of the "one or more of the defendant alarm companies" chooses in some areas to operate at a loss (Finding 47). (This equivocal finding cannot mean AFA.)

(d) There were acquisitions with occasional accompanying covenants by sellers not to compete with the alarm

company defendants (see Finding 51). (The implication is that AFA could have been a party to such arrangements or obtained such covenants but the record does not show that AFA ever made any such acquisitions, and if any other defendant did so, it was not shown that AFA even knew about any such acquisitions or had the remotest connection with them.)

(e) As among the defendants, AFA continues as the exclusive source of central station fire alarm service in New York, Philadelphia and Boston (Finding 53).

(f) The alarm companies depart from the schedule of Minimum Basic Service Charges and "ceiling prices" which constitutes standard rates, whenever they encounter actual or threatened effective competition (Finding 55).

The last finding mentioned must have been predicated mainly on activities of other defendants. AFA had no national accounts. It never had a policy of percentage deviations. It never made an installation charge. It does have advance service charges. There was only one instance of a reduced price shown in the evidence, viz., in GX Exhibit 246, which related to a package deal. It never got to be explained in the evidence, and it was an isolated transaction hardly sufficient to justify any action.

In any event those findings of "ultimate fact" are all the findings of fact made as to AFA, and most of these were blanketed in and made to apply to AFA by implication. Thus, acts of other defendants were imputed to AFA both as a basis of blanket findings of restraint of trade, and as *indicia* of monopoly power.

There was no evidence that Grinnell exercised such control over the activities of AFA that it became a mere cog in the wheels, and, consequently, an integral part of a multi-state operation being carried on under the direction and control of Grinnell. To the contrary, the evidence indicates that Grinnell did not participate in the management of AFA. Furthermore, there were minority stockholders in AFA, and these were actively represented among AFA's directors.

At the time when the 1907 agreement was made, concededly Grinnell had no stock ownership in AFA.* Grinnell's first acquisition of controlling stock came in 1949, 42 years after the now criticized agreement. Still five years later, in 1954, that agreement expired. The other acquisitions made by Grinnell during those five years hardly support any relating back to 1907, and finding an intervening combination and conspiracy.

The incidental findings that there was generic similarity in contract forms, price lists, etc., used by the defendant alarm companies, and that this similarity establishes violations of the Sherman Act, are equally without foundation. Any similarity which exists is one naturally growing out of the similarity of business done by the alarm companies.

Similarly, the implied finding that acquisitions were an important source of AFA's market power is erroneous because AFA did not have any acquisitions. Only one proposed acquisition by AFA is mentioned in the record. It related to Central Station Signals. That proposed acquisition was conditioned upon approval of counsel and

* AFA was not incorporated until 1920.

clearance from appropriate Government agencies but it was never consummated (GX 54, 57; GX 339, p. 62).

With so many unsupported findings, there is too much implication and too much imputation. A decision so based should have plenary review.

6. The Effect of the 1906 and 1907 Agreements

The District Court found that an agreement of September 28, 1906 between ADT and Holmes had an influence in forming business patterns of AFA (Finding 52, App., p. 23a). Under that agreement ADT conveyed to Holmes all its burglar alarm business in a number of areas in which ADT agreed to refrain from engaging in burglar alarm service, while Holmes agreed to refrain from engaging in any protection service outside of those areas, and to confine itself within those areas to burglar alarm service and some nightwatch service.

The implication of the decision is that when AFA made an agreement a year later on April 29, 1907 with Grinnell, ADT and a non-defendant company, Automatic Fire Protection Company, under which AFA agreed to refrain from engaging in night watch and burglar alarm service in New York, Philadelphia and Boston, there began a business pattern which had been influenced by the earlier agreement to which AFA had not been a party. The District Court's conclusion, however, is based on pure speculation. It has raised an accident of circumstances to the deviousness of a conspiracy. Recognizing that all the agreements had expired by 1954 and pointing out in Conclusion of Law No. 3 (App., p. 26a) that it might be too late for the Government now to seek injunctive relief from the

legal instruments, the Court discovered that what it calls "the folds in the industrial scene" or patterns based on illegality and conspiracy have continued to the present and must be wiped away injunctively.

The implication is that absent the pattern influenced by an agreement to which AFA was not a party, AFA would have expanded into the burglar alarm business, and that Holmes would have gone into the fire alarm business.

Finding 53 (App., p. 25a) notes that Grinnell does not furnish any of the types of service originally precluded by the 1907 agreements. This seems to imply that absent the 1907 agreement Grinnell which was not in any CSPS business would have gone into both the fire alarm business and the burglar alarm business. All this is pure speculation which goes to show not what might have happened and how it happened, but instead indulges in pure theory as to what could have happened as against the actual history of what did happen.

All this disregards that fact that in 1907 no one could anticipate that AFA would be organized in 1920, and that in 1949 Grinnell would purchase controlling stock of AFA. It also ignores the fact that the 1907 agreement was needed to clear up patent problems, and to set up a joint venture enabling the parties effectively to pioneer in the development of a new business. At that time if there were any of what the District Court calls "cognoscenti" in the antitrust field, they could hardly have imagined that such agreements were illegal.

Ancient agreements long since expired nevertheless became in the Court's mind past misconduct justifying find-

ings of continuing combination and conspiracy, and restraint of trade, and illegal monopoly. This, in turn, led to the notion that the judicial knife must obliterate history.

Whether the 1906 and 1907 agreements were illegal, and whether illegal patterns of conduct grew out of them, and continued until this case was filed, are basic questions deserving a full review by the Supreme Court.

7. The Propriety of the Relief Granted

Although the District Court recognized that it was dealing with a relatively small industry (Opinion on Liability, par. 6, App., p. 29a), and that "this is not a big case in any sense" (Opinion on Remedy, par. 1, App., 31a), the Court nevertheless concluded that this case demanded "a decree of scope and strength" (*id.*, par. 1).

Passing from these observations, the Court directed its attention to Mr. Fleming who is the President of Grinnell, and also serves as a director of AFA, finding him sophisticated and "possibly, risk-taking," and he must have been aware of the most flagrant and clear violations by the companies he controlled, and "maybe he shrewdly weighed business advantage against business disadvantage" (*id.*, par. 2).

These findings then called for a major judicial attack upon what had been described only a page before as "a plant of minor importance in the rich forest of our American economy" (Opinion on Liability, par. 10, App., p. 30a), and for the banishment of Mr. Fleming who finally emerged as "the vigorous captain of the defendants' con-

spiracy to monopolize" (Opinion on Remedy, par. 6, App., p. 34a).

This striking development in the course of the opinion is all the more surprising in view of the District Court's statement in Finding 19 (App., p. 13a):

> "However, in courts, unlike on the stage, the drama need not concentrate upon the parties' motives."

Similarly, in Finding 20 (App., p. 14a), the District Court also said:

> "Speculation as to motives may be favored by playrights, prosecutors, and jurors, but judges do well to take in a Pickwickian sense Pascal's dictum that 'the heart has reasons of which the reason knows not.'"

Drama or not, the fast acceleration of the action in the opinion culminates in a sweeping injunction against AFA, which was an almost unnoticed walk-on in the play.

As regards AFA, the decree prohibits any future acquisitions in the designated market (Final Decree, par. 2, App., p. 36a). This prohibition was made despite the fact that there is no claim or evidence that AFA made any previous acquisitions. This broad ban on acquisitions will have the effect of freezing the status of AFA.

In view of the divestiture provisions directed at Grinnell, the presumed objective of the decree is to permit, if not to require, AFA to expand its operations after it is divested. One subject of complaint was that AFA was confined to limited operations and in only three cities. If AFA is to break the bounds of such confinement whenever

it is able and as opportunities present themselves, it should be permitted to purchase assets of any business in the designated market becoming available, for purchase.

Similarly, it should be permitted to purchase any of the business from which it was allegedly excluded whenever such business is offered for sale. If, for any reason important to the seller, this can be accomplished only by a stock purchase, AFA should not be prevented from using any technique of purchase required by the seller.

The decree also contains a blanket prohibition against "restraining trade, or attempting or combining to restrain trade in that designated market and from further attempting to monopolize, or conspiring to monopolize, or monopolizing that designated market" (Final Decree, par. 2, App., p. 36a). This language extends to every conceivable violation of Sections 1 and 2 of the Sherman Act, whether traditionally recognized by the courts or yet to be enunciated in future opinions.

A final decree ought to so specify the prohibited conduct or practice that any individual to whom it applies can make a reasonable determination whether any proposed course of conduct would be a violation punishable as a contempt of court. *Cf. Schine Theatres* v. *United States,* 334 U. S. 110, 125-126 (1948).

The "cognoscenti" and the "academicians" mentioned by the District Court can be expected to debate the application of the Sherman Act to many situations. If this be so, how is an ordinary individual, perhaps not yet employed by AFA, to know that he is commencing a course

of conduct leading to serious penalties? The decree itself is directed not only to the defendants but also to "all acting in behalf of them or any of them" (App., p. 36a).

The District Court itself mentioned "modern judicial susceptibilities, and increased awareness of the right of prospective defendants to clear warning of what constitutes criminal conduct" (App., p. 5a).

The Supreme Court has mentioned the importance of a clear indication of the prohibited conduct in *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 410, where Mr. Justice Roberts, writing for the Court, stated:

> "* * * The decree must not be 'so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt'; enjoin 'all possible breaches of the law'; or cause the defendants hereafter not 'to be under the protection of the law of the land.'" (citing *New York & New Haven Railroad Company* v. *Interstate Commerce Commission*, 200 U. S. 361 and *Standard Oil Co.* v. *United States*, 221 U. S. 1).

A novel feature of the final decree is the requirement that AFA and the other alarm company defendants file price lists and terms of sale with the Antitrust Division of the Department of Justice as well as reports of every deviation from such standard lists (App., p. 36a). Presumably this provision is intended to permit the Department of Justice to police any price discrimination. This provision seems to import a requirement of compliance with the Robinson Patman Act which does not apply to

AFA which is not engaged in the sale of commodities or products.*

The opinion on remedy (par. 4, App., p. 32a) also contains a vague threat that any variation from the filed standard list may soon bring down upon AFA affirmative action by the Department of Justice, and ultimately penalties for contempt, for the District Court said:

> "* * * But if an alarm company defendant seeks to depart in individual instances from its standard schedule, then it must report the departure and run the risk of being charged with invidious, illegal discrimination * * *"

It is not apparent how a present or future employee of AFA can determine what might be considered either by the Department of Justice or the Court as "invidious, illegal discrimination."

The nature of the business itself creates other uncertainties. Obviously, the cost of installation of fire alarm equipment will necessarily vary as between different types and locations of particular buildings and the extent to which full coverage of every risk of fire is sought. Job conditions will create extras and necessarily change the price. In the fire alarm business, too, variations from general standards must be inevitable. Nevertheless, the final decree drawn by the Court itself is obviously intended

* In *Automatic Fire Alarm Co.* v. *Bowles*, 143 F. 2d 602 (U. S. Emergency Court of Appeals 1944) already mentioned, the Court held that the services supplied by AFA's operating subsidiary could not be considered a "commodity" either in the ordinary and accepted meaning of that term or under the Emergency Price Control Act of 1942, §302(c), 50 U. S. C. A. Appendix §942(c) (Headnote No. 4 of this case).

to hang like "the sword of Damocles" over every present and future employee of AFA, whether engaged in estimating the cost of installing or continuing service, and giving quotations to a present or prospective customer.

Apart from the effect that such a provision can have on the morale of working personnel, one cannot disregard the subtle impression which must be conveyed to customers and to the public that AFA will be operating under the watchful eye of the Department of Justice and under some special sanctions to be imposed by a United States District Court.

The ban on any employment of James D. Fleming by AFA after April 1, 1966, affects AFA to the extent that if its stockholders should desire to re-elect Mr. Fleming as a director, which is the only position in which he has heretofore served AFA, the final decree will bar such action. It will, of course, similarly prohibit any new employment of Mr. Fleming by AFA. It thus restrains AFA and its stockholders from exercising the liberty and freedom of action ordinarily assured to a corporation or individual under the Constitution and our system of laws generally.

The Court's strictures as to Mr. Fleming are, of course, broader than the interest of AFA and its stockholders in desiring to have the continued benefit of his experience, wisdom, and judgment if he be willing to continue to serve. The broad restriction on the activities of Mr. Fleming, a non-defendant, goes far beyond any relief heretofore approved by the Courts.

While the District Court pointed out that its directions were intended to be prophylactic rather than punitive, its earlier statements of the necessity of a strong decree cannot be forgotten. The decree as a whole gives a definite impression of punishment rather than the efforts of equity to contrive constructive measures to achieve the beneficent purposes of the Sherman Act.

The Supreme Court has plainly indicated the true office of a final decree in a civil antitrust case.

See: *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U. S. 316, 326:

"* * * The key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition. Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive. * * *"

And at page 327:

"* * * If the remedy chosen is not effective, it will not be saved because an effective remedy would entail harsh consequences. This proposition is not novel; it is deeply rooted in antitrust law and has never been successfully challenged. The criteria were announced in one of the earliest cases. In United States v. American Tobacco Co., 221 US 106, 185, 55 L ed 663, 696, 31 S Ct 632 (1911), we said:

'In considering the subject * * * three dominant influences must guide our action: 1. The duty of giving complete and efficacious effect to the prohibitions of the statute; 2, the accomplishing of this result with as little injury as possible to the interest of the general public; and, 3, a proper regard for the vast interests of private property which may have become vested in many persons as a result of the

> acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning.' "

Surely a final decree shaped to meet the circumstance of a case should be an end to the problems presented, and not just a beginning of new problems born of uncertainties, or a new shackling of defendants who should be encouraged, if not required, to play their part in the free competition needed to expand our economy.

All of these questions as to the propriety of the purportedly corrective directions of the final decree raise important questions of general interest which should be reviewed by the Supreme Court.

8. Questions Arising as to the Trial Itself

Defense counsel sought a delay of trial which on May 18, 1964 the Court set peremptorily for June 15, 1964. This application was denied (Transcript of June 3, 1964). By this time statements had been made by the Court which were taken as an indication that the case had been prejudged against the defendants, and this led to defendants' motion for disqualification.

The motion was quickly disposed of, and the trial proceeded as scheduled. The Government's case was entirely documentary without a single witness being called. Large masses of documentary evidence including hearsay and statements of alleged co-conspirators were received in

bulk against AFA without any foundation being laid by independent evidence of conspiracy or of AFA's connection to it. The defendants were then forced to proceed against the as yet unannounced doctrine under which most of the Government's evidence was being considered unnecessary.

At this point it has to be assumed that the District Court later studied the voluminous documentary evidence, and found that the foundation and connection was all shown somewhere in the mass of documents as a whole. (*cf.* R. 26-27). The findings and opinions do not purport to analyze the particular evidence thought to establish conspiracy and AFA's connection to it. To the extent that decision treats AFA as one of a group and finds that one or more of the group committed acts, it is wholly unsupported as to AFA because any such acts were solely those of another defendant.

For example, in Finding No. 47 (App., p. 21a), the Court stated:

> "* * * because of their national operations, one or more defendant alarm companies choose in some areas to operate at a loss."

AFA never did that and yet AFA was included merely by being one of the alarm company defendants.

The jurisdictional statement filed by Grinnell fully covers the questions as to objections concerning the trial itself, and is adopted as support for this statement without detailed repetition here.

By being forced to trial prematurely before a judge who expressed himself so strongly against it, and who

later failed to weigh admissibility of the particular evidence offered against it in accordance with normal trial procedures, AFA was deprived of due process and a fair trial.

In this respect this appeal not only presents questions of fair trial and due process but also invokes the supervisory power of the Supreme Court over proceedings and trials in the District Court.

Summary and Conclusion

The Supreme Court has complete jurisdiction of this appeal which provides the only avenue of review available to AFA. *Cf. Brown Shoe Co.* v. *United States,* 370 U. S. 294, 335 (1962); *United States* v. *du Pont de Nemours & Co.,* 366 U. S. 316, 324; *Hartford-Empire Company* v. *United States,* 324 U. S. 570, 571, clarifying 323 U. S. 386. Plenary consideration thereof is essential in the interest of justice.

The District Court has taken a new position on matters of procedure and has made rulings on matters of law going beyond previously decided cases. The implications of the new doctrines so enunciated are of general concern.

The District Court's decision and decree not only has effects of tremendous consequence to the appellant AFA and, presumably, to its co-defendants, but also it raises questions of widespread importance to business in general. The required removal of James Douglas Fleming holds a threat to all corporate officers and directors who may hold office while a corporation becomes subjected to charges

of antitrust violation. This could have the effect of deterring many individuals of experience and judgment from accepting appointments as an officer or director.

The decree also enjoins AFA from further violating the provisions of Sections 1 and 2 of the Sherman Act *in haec verba* without relating the broad terms of the statute to any particular act, omission or practice. The decree then purports to make this general restraint effective by requiring AFA to file price lists and terms of sale or servicing with the Antitrust Division of the Department of Justice, and to file a record of every deviating quotation. This requirement unjustly creates a public impression that any such filing indicates wrongdoing, and may immediately bring harsh penalties of law down upon AFA.

Apart from the injunctive provisions of the decree, there are substantial and serious questions of jurisdiction and liability where AFA is concerned. By invoking the rule of joint liability springing from conspiracy, the District Court made no distinction between the particular situation of AFA and that of its co-defendants. It did not address itself specifically to the fact that in each of the three cities in which AFA, through a subsidiary corporation, transacts business, its operation is entirely local and confined to that particular city. It did not address itself specifically to the fact that in the case of each separate city the local operation does not in any way extend across state lines. Nor was any consideration given to the fact that in each city AFA has substantial competition, and nothing resembling a monopoly.

In relying entirely on a theory of joint liability, District Court has held AFA liable for activities of ot in a wide field over a wide area in which AFA was n engaged and in which it was not equipped to engage. the same time, AFA has, in effect, been held liable for of Grinnell in acquiring and holding interests not onl AFA, but also in ADT and Holmes.

In the aggregate, none of the questions raised by appeal can be disposed of without detailed considera of the record upon briefs and with oral argument. questions are important and of widespread interest. U these circumstances, probable jurisdiction should be n and the case entered upon the docket for a hearin the merits.

Respectfully submitted,

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